Supreme Court, U.S.
FILED
JUN 23 1992
OFFICE OF THE CLERK

(2)

No. 91-1875

In The

Supreme Court of the United States

October Term, 1991

SEBASTIAN C. SISTI,

Petitioner,

vs.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Sebastian Sisti's questions presented section alleges a circuit court split that does not exist and relates to matters irrelevant to the single issue in this case:

1. Whether the Court of Appeals for the Fourth Circuit and the District Court for the Eastern District of Virginia correctly concluded that Sisti failed to state a basis under the Federal Arbitration Act for vacation of an arbitration award.

PARTIES TO THE PROCEEDING

The petitioner is Sebastian C. Sisti ("Sisti"), a *pro se* arbitration claimant, plaintiff, appellant and petitioner. The respondent is Merrill Lynch, Fierce, Fenner & Smith, Inc. ("Merrill Lynch").

STATUTE INVOLVED

Section 10 of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, has a direct bearing on the proper disposition of this case. That section defines the limited circumstances in which a binding arbitration award may be vacated.

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the application —
>
> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (e) Where an Award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 10 (1976).

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COUNTERSTATEMENT OF THE CASE

Sisti's statement of the case is replete with misrepresentations of law and misstatements of fact. Merrill Lynch believes it is necessary, therefore, to state the case as it should have been stated at the outset.

On June 9, 1980, Sisti opened a margin account with Merrill Lynch. He signed at that time a standard Merrill Lynch Customer Agreement. Sisti subsequently invested thousands of dollars in a variety of securities investments. Sisti pursued his own novel investment strategies. In the serious market drop of 1987, Sisti lost most of his investments. In October 1987 Merrill Lynch closed Sisti's account.

On May 4, 1989, Sisti filed a *pro se* demand for arbitration with the National Association of Securities Dealers, Inc. Sisti alleged there that Merrill Lynch had unlawfully charged him interest on certain accounts and had engaged in a widespread scheme to defraud him and countless others by its handling of customers' Special Memorandum Accounts.

On October 24-26, 1990, an arbitration panel conducted hearings in Richmond Virginia. Sisti represented himself throughout the hearings.

On November 27, 1990, the panel returned its Award. The Award stated that the "claims by the Claimant Sebastian C. Sisti be and hereby are dismissed in all respects."

On February 27, 1991, Sisti filed in the Eastern District of Virginia, Richmond Division, a *pro se* Petition to Vacate Arbitration Award. The petition purported to state a claim for vacation of the arbitration award under the Federal Arbitration Act, 9 U.S.C. § 10. Despite the opportunity to do so, Sisti did not have the arbitration hearings transcribed and made a part of his petition.

On March 21, 1991, Merrill Lynch moved the court to dismiss the petition for failure to state a basis for vacation of an arbitration award, pursuant to Federal Rule of Civil Procedure 12(b)(6).

Merrill Lynch based its motion on the ground that Sisti's petition to vacate, as evidenced by the record and pleadings before the district court, stated nothing more than a claim of legal error on the part of the arbitrators and that an award could not be vacated under the Arbitration Act on such a basis.

The district court agreed. On April 22, 1991, the District Court dismissed Sisti's petition in a thorough Memorandum Opinion. The Court found that Sisti had "confirm[ed] Merrill Lynch's argument" that he had stated at best a claim of legal error.

The court also noted that at oral argument Sisti asserted that the arbitrators knew the law but "simply disregarded its proper application." Mem. Op. at 5. The District Court concluded, however, that "regardless of the verbiage used, Sisti's contention amounts to an argument of legal error, an argument that fails to present a valid reason to vacate an arbitration judgment." *Id.* "It is well-settled that courts cannot vacate arbitration awards on the ground that the panel has committed errors of law." *Id.* (*citing Miller v. Prudential Bache Securities*, 884 F.2d 128, 130 (4th Cir. 1989).

Thus, contrary to what Sisti has advised this Court, the district court held that an allegation of legal error was insufficient for vacatur; it did not hold that manifest disregard of the law by an arbitration panel was insufficient. Indeed, the issue of manifest disregard was never addressed by the Court because Sisti was found to have alleged only errors of law. The district court followed, therefore, the well-settled law that courts cannot vacate arbitration awards where all that has been alleged is that the panel committed errors of law.

On May 20, 1991, Sisti filed a notice of appeal to the fourth circuit. The fourth circuit promptly directed the parties to proceed with informal briefs.

On February 21, 1992, the Fourth Circuit issued a one paragraph per curiam opinion affirming the District Court's opinion "on the reasoning of the district court." The Fourth Circuit held that its "review of the record and the district court's opinion discloses that this appeal is without merit." The Fourth Circuit did not use, reference, or rely on the doctrine of manifest disregard of the law that Sisti has made the centerpiece of his petition for certiorari.

REASONS FOR DENYING THE WRIT

The Court should deny the petition for certiorari for numerous reasons. First and foremost, the lower courts properly concluded that Sisti had failed to state a basis under the Arbitration Act to vacate an arbitration award. Given the finding that Sisti had alleged mere errors of law, which finding has not and cannot be challenged, the lower courts had no alternative but to conclude that Sisti had failed to state a cognizable claim for vacation of an arbitration award. Indeed, but for this Court's admonition that counsel has an "obligation" to "point out perceived misstatements" in the petition for certiorari, Sisti's patently frivolous petition would not merit a reply. Sisti, however, has taken tremendous liberties in his presentation of the facts and law to this Court.

I.

SISTI'S CONTENTION THAT THERE IS A SPLIT IN THE CIRCUIT COURTS ON THE QUESTION OF MANIFEST DISREGARD OF LAW IS WRONG.

Sisti petitions this Court to grant a writ of certiorari to resolve a circuit split that does not exist. He does so, moreover, on an issue that has not been at any time the basis of any judicial decision in this case. Let the record be clear: there is no split in the circuit

courts with respect to whether an arbitration award may be vacated upon a showing of manifest disregard of the law.

Contrary to what Sisti has advised this Court, the Fourth Circuit shares the view of its sister circuits that an arbitration award may be vacated where there has been manifest disregard of the law by an arbitration panel. *Compare Upshur Coals Co. v. United Mine Workers*, 933 F.2d 225, 229 (4th Cir. 1991) ("a legal interpretation of an arbitrator may [] be overturned where it is in manifest disregard of the law") *with Merrill Lynch, Pierce, Fenner & Smith v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) ("Manifest disregard of the law by arbitrators is a judicially-created ground for vacating their arbitration award . . . . Although the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law . . . . Judicial inquiry under the 'manifest disregard' standard is therefore extremely limited.").

It is not surprising that Sisti does not cite in his petition any case law to support his bald allegation that the Fourth Circuit does not recognize the doctrine of manifest disregard of law. Indeed, the only Fourth Circuit case cited by Sisti stands for the unremarkable proposition that mere errors of law are not a proper basis for vacatur under the Federal Arbitration Act. *See Miller v. Prudential-Bache Securities, Inc.*, 884 F.2d 128, 130 (4th Cir. 1989) ("federal courts have consistently held that they will not set aside an arbitrator's award for mere errors of law."). *Miller* does not address at all the doctrine of manifest disregard. Thus, the one case cited by Sisti is entirely irrelevant to the question of whether manifest disregard of the law is a proper basis for vacatur.

The Fourth Circuit case that does directly address application of the manifest disregard doctrine, *Upshur Coals Co.*, is not even mentioned by Sisti. The reason may be guessed. It belies any

suggestion that the Fourth Circuit approach to the doctrine is any different from that of the Second Circuit.

In short, the alleged circuit split on which Sisti so heavily relies does not exist. Because there is no divergence on this issue, Sisti's petition for certiorari should be denied. As Sisti states in his petition: "Stripped to its bare essentials, there is only one issue before this Court: Can the second circuit and the fourth circuit diverge on their application of the doctrine of Manifest disregard." Petition for Cert. at 17.

II.

WHETHER ARBITRATION AWARDS MAY BE VACATED FOR MANIFEST DISREGARD OF LAW IS IRRELEVANT TO THE DISPOSITION OF THIS CASE.

The question whether proof of a manifest disregard of law states a basis for vacatur is unrelated to any issue in this case. Neither the district court nor the Fourth Circuit applied or refused to apply the doctrine of manifest disregard of law. The reason is plain. Sisti did not allege a claim of manifest disregard of law.

Indeed, the district court expressly found that Sisti alleged "legal error," not "manifest disregard of law." As the court found, "regardless of the verbiage used, Sisti's contention amounts to an argument of legal error, an argument that fails to present a valid reason to vacate an arbitration judgment." Because the legal authority is monolithic and overwhelming that mere legal error by an arbitration panel does not state a basis for vacation of an arbitration award, the district court correctly dismissed Sisti's claim, and the Fourth Circuit properly affirmed that determination. "[F]ederal courts have consistently held that they will not set aside an arbitrator's award for mere errors of law." *Miller v. Prudential Bache Securities, Inc.*, 884 F.2d 128, 130 (4th

Cir. 1989), *citing Office of Supply, Govt. Republic of Korea v. New York Naval Co.*, 469 F.2d 377, 379 (2d Cir. 1972) ("An award will not be set aside because of an error on the part of the arbitrators in their interpretation of the law."). This conclusion follows directly from the fact that 9 U.S.C. § 10 does not reference errors of law as among the reasons a court may vacate awards. *See Refino v. Feuer Transp., Inc.*, 480 F. Supp. 562, 565 (D.C.N.Y. 1979), *aff'd*, 633 F.2d 205 (2d Cir. 1980) ("the grounds specified in section 10 . . . do not include mistakes of fact, errors of law, inadequate reasoning, or even arbitrary determinations.").

In short, the lower courts properly concluded that Sisti failed to state a basis under the Federal Arbitration Act for the vacation of an arbitration award.

As the district court found, "the federal courts endow binding arbitration awards a significant presumption of validity, *City of Parkersburg, W.Va. v. Turner Constr. Co.*, 612 F.2d 155, 156 (4th Cir. 1980), and generally confine review of such awards to determining whether one of the statutory grounds for vacating an award exists. *National R.R. Passenger Corp. v. Chesapeake & O. Ry. Co.*, 551 F.2d 136 (7th Cir. 1977)." When the district court found that Sisti had not stated such a ground, it properly dismissed the Petition to Vacate Arbitration Award.

III.

SISTI'S PETITION IS REPLETE WITH FACTUAL ERRORS.

In his petition for certiorari, Sisti argues that Merrill Lynch's witnesses "lied under oath for more than two hours" at the arbitration hearing when they discussed how they apply various securities regulations and how various accounts at Merrill Lynch operate. These charges by Sisti are not new. Nor are they true.

Indeed, since Sisti began his one man campaign years ago to smear the integrity of Merrill Lynch, he has resorted with increasing frequency to such rhetorical flights of fancy. Sisti makes these claims, as he always has, without citation to any evidence. Instead, Sisti questions whether a metaphor used by a Merrill Lynch witness was apt and whether a legal argument presented by counsel for Merrill Lynch was merited. This does not sustain Sisti's desperate charges.

Similarly, Sisti cites no evidence in the record to support his gross misstatements of the facts with respect to Merrill Lynch's handling of its customers' accounts. Rather, he hints conspiratorially of unknown, unidentified attorneys and their investigation after the arbitration hearing. None of this is anywhere in the record. As the evidence presented to the arbitration panel revealed, and as was found, Sisti's charges are wholly without merit.

Merrill Lynch suggests that the inaccuracies and misrepresentation of fact and law in the Petition for Certiorari violate Rule 21.5, Rules of the Supreme Court of the United States. They serve, therefore, as independent bases for dismissing the Petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied, and Merrill Lynch should be awarded its costs and fees herein expended.

Respectfully submitted,

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